



TOSHA INSTRUCTION

TENNESSEE DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT
DIVISION OF OCCUPATIONAL SAFETY & HEALTH

DIRECTIVE NUMBER: CPL-TN 02-00-114
(CPL-TN 2-0.114)

EFFECTIVE DATE: March 2, 1999

SUBJECT: Abatement Verification

TO: TOSHA Personnel

FROM: Robert B. Cooper, Chief, Standards & Procedures

THRU: John Winkler, Interim Director

SUBJECT: Abatement Verification

DATE: March 1, 1999

A. PURPOSE: This instruction establishes enforcement policy and procedures for the Abatement Verification Regulation.

B. DOCUMENTS AFFECTED:

1. TOSHA Field Operations Manual (FOM).
2. This instruction incorporates the provisions of OSHA Instruction CPL 2-0.114 dated May 28, 1998, Subject: Abatement Verification Regulation, 29 CFR 1903.19 - Enforcement Policies and Procedures.

C. DOCUMENTS REFERENCED:

1. Official Compilation - Rules and Regulations of the State of Tennessee, Rule Chapter 0800-1-4 - INSPECTIONS, CITATIONS, AND PROPOSED PENAL-TIES, Rule 0800-1-4-.23 Abatement Verification.
2. Federal Register, Vol. 62, No. 61, March 31, 1997, pages 15324-15340, Abatement Verification, Final Rule, 29 CFR 1903.19.

D. BACKGROUND:

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1. On May 8, 1991, the General Accounting Office (GAO) issued a report to Congress (GAO/HRD-91-35 OSHA: Confirming Abatement of Hazards) on the adequacy of OSHA's policies and procedures for determining whether serious hazards have been abated. GAO found OSHA's policies incomplete in two ways: (1) they do not require, but merely request, employers to provide evidence of abatement, and (2) they inadequately address verification of abatement of hazards found at construction worksites. OSHA published a final rule to remedy these deficiencies in the Federal Register on March 31, 1997 (see C.2. of this instruction).
2. TOSHA adopted the provisions of the OSHA final rule through promulgation of Rule 0800-1-4-.23 (see C.1. of this instruction) in April, 1997. The promulgation document were lost in the move of the TDOL Legal Section from Andrew Johnson Tower to Tennessee Tower and the rule was again promulgated on October 12, 1998. It was filed with the Secretary of State on November 24, 1998, and is effective March 30, 1999.
3. The new regulation/rule codifies, simplifies and streamlines the abatement certification procedure that OSHA and TOSHA previously used. The new procedures will reduce both employer's and OSHA's/TOSHA's administrative and paperwork burdens, enhance employee participation in the abatement process, increase the number of cited hazards that are quickly abated, and standardize OSHA's/TOSHA's abatement procedures.
4. Important Terms And Concepts:
 - a. ***Abatement verification*** includes abatement certificates, abatement documents, abatement plans, and progress reports.
 - b. ***Affected employee*** means those employees who are exposed to the hazard(s) identified as violation(s) in a citation. This term is critical for the proper application of paragraph (*) ***Employee notification***.
 - c. ***Final order date*** means:
 - (i) For an **uncontested** citation item, the twentieth (20th) calendar day after the employer's receipt of the citation.
 - (ii) For a **contested** citation item:
 - (a) The thirtieth (30th) day after the date on which a decision or

order is issued by as administrative law judge of the TOSHRC;

- (b) The thirtieth (30th) day after the date on which a decision or order of a Chancery Court of the Court of Appeals is issued if the TOSHRC decision or order is appealed; or
- (c) The date on which the Tennessee Supreme Court issues a decision or order if the decision of the Court of Appeals decision or order is appealed.

- d. **Movable equipment** means a hand-held or non hand-held machine or device, powered or unpowered, that is used to do work and is moved within or between worksites. Hand-held equipment is that which is hand held when operated. Basically, hand-held equipment can be picked up and operated with one or two hands, such as a hand held grinder, skill saw, portable electric drill, nail gun, etc.
- e. **Worksite** is, for the purpose of enforcing the abatement verification rule, the physical location specified under the heading "Description" in the citation. If no location is specified, the worksite is the inspection site where the cited violation occurred.

E. **CITATIONS:** The effective date of Rule 0800-1-4-.23 is March 30, 1999. TOSHA will apply the regulation for all inspections initiated on or after April 1, 1999. The policies and procedures contained herein supersede the Field Operations Manual's guidance on verification of abatement found in paragraph A.3. of Chapter IV.

1. Except for the application of tags on movable equipment [0800-1-4-.23(10)], requiring attachment of the tag or citation immediately after receiving the citation], the abatement verification regulation does not impose any requirements on the employer until a citation item has become a final order of the Tennessee Occupational Safety and Health Review Commission.
2. All "final order" citation items, no matter what the characterization, require abatement certification within 10 calendar days of the abatement. Where there has been a contest of a violation or abatement date (not penalty), the abatement date is calculated by adding the original amount of time for abatement to the final order date.
3. Employers are not required to certify abatement for violations which they promptly

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abate during the on-site portion of the inspection and whose abatement the Compliance Officer (CO) observes. Area Supervisors may use their discretion in extending the "24 hours" time limit to document abated conditions during the inspection. Observed abatement will be documented on the OSHA 1-B for each violation following the guidelines of the Field Operations Manual (FOM) Chapter IV, as well as on the citation.

4. By rule [0800-1-4-.23(4)(a)], all willful and repeat citations require abatement documentation, such as written, videographic or photographic evidence of abatement.
5. Also by regulation [0800-1-4-.23(4)(a)], the employer must provide abatement documentation for any serious violation for which the Agency indicates on the citation that such abatement documentation is required. TOSHA policy is that all high gravity serious citations will require abatement documentation. Where, in the opinion of the Area Supervisor, abatement documentation is not required for a high gravity serious violation, the reasoning will be noted in the case file. This directive sets new policy regarding whether an employer must provide abatement documentation for moderate and low gravity citations. Normally, moderate or low gravity serious citations shall not require abatement documentation. The exception is, that the Area Supervisor shall require evidence of abatement for moderate and low gravity serious citations under the following circumstances:
 - a. If the establishment has been issued a citation for a willful violation or a failure-to-abate notice for any standard which has become a final order in the previous 3 years; OR
 - b. If the employer has any history of a violation that resulted in a fatality or an OSHA 200 log entry indicating serious physical harm to an employee in the past 3 years. The standard being cited must be similar to the standard cited in connection with the fatality or serious injury or illness.
6. For abatement periods greater than 90 calendar days, the rule allows the Area Supervisor flexibility in either requiring or not requiring monitoring information. Note that Paragraphs (6) and (7) of Rule 0800-1-4-.23 have limits; the Area Supervisor is not allowed to require abatement plans for abatement periods less than 91 days or for citations characterized as non-serious. Progress reports may not be required unless abatement plans are specifically required. The requirement for abatement plans and progress reports must be indicated for the citation item to which they relate. The rule places an obligation on employers, where necessary, to identify how employees are to be protected from exposure to the violative condition during

the abatement period. One way of ensuring that interim protection is included in the abatement plan is to note this requirement on the citation. There is nothing in this directive or the regulation prohibiting progress reports as a result of settlement agreements.

7. All settlement agreements (informal, formal, and corporate-wide) that have citation(s) must contain language stating that the employer must comply with the requirements of 29 CFR 1903.19 for all final order citations.
8. Only equipment, whether hand-held or not, which is moved within the worksite or between worksites, is required to be tagged. The tag is intended to provide an interim form of protection to employees through notification for those who may not have knowledge of the citation or the inherent hazardous condition. Compliance Officers should make every effort to be as detailed as possible when documenting the initial location where the violation occurred. This documentation is critical to the enforcement of the tagging requirement [0800-1-4-.23(10)] because the tagging provision is triggered upon movement of the equipment.
9. Tag-related citations must be observed by a CO before a citation is issued for failure to initially tag cited movable equipment. TOSHA must be able to prove the employer's initial failure to act (tag the movable equipment upon receipt of the citation). Where there is insufficient evidence to support a violation of the employer's initial failure to tag or post the citation on the cited movable equipment, a citation may be issued for failure to maintain the tag or copy of the citation using Rule 0800-1-4-.23(10)(f).
10. An initial minor non-substantive omission in an abatement certificate (e.g., lack of a definitive statement stating that the information being submitted is accurate) should be considered a de minimis violation of the regulation. If there are minor deficiencies such as omitting the signature or date, the employer should be contacted by telephone to verify that the documents received were the ones they intended to submit. If so, the date stamp of the Area Office can serve as the date on the document. A certification with an omitted signature should be returned to the employer to be signed, when the Area Supervisor believes it would be beneficial.
11. Like tag-related citations, evidence of an employer's failure to notify employees by posting must be obtained at the worksite. Where an employer claims that posting at the location where the violation occurred would ineffectively inform employees [0800-1-4-.23(8)(b)], the employer may post the document or a summary of the document in a location where it will be readily observable by affected employees and their representatives or may otherwise communicate fully with affected employees

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and their representatives about abatement activities. The CO must determine not only whether the documents or summaries were appropriately posted but also whether, as an alternative, other communication methods, such as meetings or employee publications, were used.

12. As a matter of policy, a Petition for Modification of Abatement Date (PMA) received and processed in accordance with the guidance of the FOM will suspend the 10-day time period for receipt of the abatement certification for the item for which the PMA is requested. Thus, no citation will be issued for this item for failure to submit the certificate within 10 days of the abatement date. If the PMA is denied, the 10-day time period for submission to TOSHA begins on the day the employer receives notice of the denial.
13. Also, as a matter of policy, TOSHA will not be issuing citations for failure to submit an abatement certificate for violations of 0800-1-4-.23(4).

F. CITATION ISSUANCE PROCEDURES: Citations for failure to certify can be issued without formal followup activities by following the procedures identified below.

1. If abatement certification and any required documentation are not received within 13 calendar days after the abatement date [the rule requires filing within 10 calendar days after the abatement date; and another 3 calendar days is added for mailing], telephone the employer and remind him/her of the requirement to submit the material, and tell the employer that a citation may be issued.
2. If abatement verification documents are not received within 7 calendar days after the telephone call, issue a dunning letter to the employer.
3. If the certification and/or documentation is not received within the next 7 calendar days, a single non-serious citation will be issued combining all the individual instances where the employer has not submitted abatement certification and/or abatement documentation. This "non-serious" citation will be issued under the same inspection number which contained the original violations cited. The "abatement date" for this citation shall be set 30 days from the date of issuance.

NOTE: Each violation of 0800-1-4-.23(4), (5), (6), or (7) with respect to each original citation item is a separate item.

4. If abatement certification and/or documentation is not received by the time that the 30-day abatement period expires, consult the Branch Chief [and the Staff Attorney] to discuss the suitability of the case for further enforcement action, or the necessity

for a followup inspection.

NOTES:

- a. During the time between the reminder letters and citation issuance, efforts should be made to speak with the employer and determine why he/she has not complied. All communication efforts will be documented in the case file.
 - b. For those rare instances where the reminder letter is returned to the Area Office by the Post Office as undeliverable and telephone contact efforts fail, the Area Supervisor has the discretion to stop further efforts to locate the employer and document in the case file the reason for no abatement certificate.
- 5.** For those situations where the abatement date falls within the informal conference time period, and an informal conference request is likely, enforcement activities should be delayed for these citations until it is known if the citation's characterization or abatement period is to be modified.

G. PENALTIES:

- 1.** The provisions of T.C.A. §§50-3-307(a)(1) and (4) and 50-3-403 through 50-3-406 apply to all citations issued under Rule 0800-1-4-.23. The general application for adjustment factors for size and history as found in the FOM in Chapter IV. C.2.j.(5)(a) and (c) will also apply. No "Good Faith" credit shall be given to employers being cited for failure to certify abatement.
- 2.** The penalty for failing to submit abatement certification documents [0800-1-4-.23(4)(a)] will be \$1,000, adjusted for size and history. In no case will the penalty for failure to submit abatement verification documents ever exceed the penalty for the entire original citation.
- 3.** The penalty for not notifying employees and tagging [0800-1-4-.23(8)(a), (b), and (d) and (10)(a), (b), (c), (e) and (f)] will follow the same penalty structure (unadjusted \$3,000) which is currently being applied for failure-to-post citations in the FOM Chapter IV.C.8.b.(3).

H. SPECIAL ENFORCEMENT SITUATIONS:

- 1.** TOSHA has retained the authority to conduct inspections and issue citations for field sanitation and most temporary labor camps in agricultural employment. There

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has been no delegation for inspection to the U.S.D.O.L. Employment Standards Administration (ESA) as in federal jurisdictions. Therefore, an employer's obligation under the abatement verification regulation still applies.

Note: All field sanitation and temporary labor camp cases will automatically comply with the Appropriations Act rider because the field sanitation standard does not apply to employers with 10 or fewer employees and the rider does not apply to temporary labor camps. (See TOSHA Instruction CPL 2.1.)

2. Construction activities pose situations requiring special consideration.
 - a. Construction site closure or hazard removal due to completing of the structure or project will only be accepted as abatement without certification where a CO directly verifies the site closure. Without CO-observed verification, the employer must certify to TOSHA that the hazards have been abated by the submission of an abatement certificate. Site closure is an acceptable method of abatement.
 - b. Equipment-related and all program-related (e.g., crane inspection, HAZCOM, respirator, training, competent person, qualified persons, etc.) violations will always require employer certification of abatement.
 - c. For situations where the main office of the employer being cited is physically located in another State or Federal jurisdiction, the Area Supervisor having the jurisdiction over the work site will proceed as if the employer's main office were in the TOSHA's jurisdiction.

I. CASE FILE MANAGEMENT:

1. The closing of a case file without abatement certificate(s) must be justified through a statement in the case file by the Area Supervisor or his/her designee, addressing the reason for accepting each uncertified violation as an abated citation.
2. The Area Offices are encouraged to review employer-submitted abatement verification materials as soon as possible but no later than 30 days after receipt. If the review will be delayed, notify the employer that the material will be reviewed by a date certain, and that the case will be closed, if appropriate after that time.
3. Abatement documentation (photos, employer programs, etc.) Shall be retained in the inspection case file.

- J.** OUTREACH: To encourage voluntary compliance, the subject matter of the regulation must be distributed to the affected employees and employers. Area Offices are encouraged to actively seek out employer and employee groups to inform them of the regulation. Some suggested outreach approaches are:
1. Opening Conference. During the opening conference the Compliance Officer should explain to the employer the advantages of immediate abatement and that there are no certification requirements for violations quickly corrected during the inspection. The agency's new Form 197 (Warn-ing tag) will be available through the normal procurement process by the Central Office. Compliance Officers are encouraged to offer "WARNING TAGS" to employers during the inspection. **COs must not apply the tags to any equipment; this is an employer responsibility.**
 2. Closing Conference. During the closing conference the Compliance Officer should thoroughly explain to the employer the abatement verification requirements.
 - a. Abatement certification is required for all citation item(s) which the employer receives except for those citation items which are identified as "Corrected During Inspection."

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- b. The violation(s) that will reflect on-site abatement and will be identified in the citations as "Corrected During Inspection" shall be reviewed at the closing conference.
 - c. Abatement documentation, the employer's physical proof of abatement, is required to be submitted along with each willful, repeat and designated serious violations. To minimize confusion, the distinction between abatement certification and abatement documentation should be discussed.
 - d. Where abatement periods for citations are expected to exceed 90 calendar days, the submission and requirements of abatement plans and progress reports are to be explained.
 - e. The required placement of tags or the citation [0800-1-4-.23(10)] must also be discussed at the closing conference, if it has not been discussed during the walkaround portion of the inspection.
- 3. Incorporate OSHA's/TOSHA's abatement verification policy and requirements into local speeches, presentations, press releases, or other public information. A special effort should be placed on approaches that can reach those small employers who would not normally be informed about new OSHA/TOSHA regulations.
- 4. Initiate mailing programs to local industry associations and employee unions, to publicize the regulation and encourage voluntary compliance. This will be accomplished utilizing "Together With TOSHA".
- K. ACTION: Area Supervisors and Branch Chiefs shall insure that the procedures established by this instruction are followed.
- L. EFFECTIVE/EXPIRATION DATES: This instruction is effective March 31, 1999 and shall remain in effect until canceled or superseded.

APPENDIX A
Steps for Citation Issuance for Alleged Violations of Rule 0800-1-4-.23(4) and (5)

